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No. 88-226

IN THE

Supreme Court of the United States

October Term, 1988

BENJAMIN R. WARD, *et al.*,

Petitioners,

-against-

ROCK AGAINST RACISM,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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November 28, 1988

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QUESTION PRESENTED

Did the Second Circuit apply the proper constitutional standard of review as articulated in prior holdings of this Court in *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984) and *United States* v. *Albertini*, 472 U.S. 675 (1984), in concluding that the municipal agency's content-neutral regulations reducing offensive noise of performances in an urban park, promulgated after a lengthy and thorough investigation, which in part required that an approved private sound engineer would control the sound board thereby limiting the loudness but providing the sound mix the performers desired, was unconstitutional as an improper infringement of artistic expression under the First Amendment based on its finding that the municipality failed to prove its regulations were the "least intrusive" and that the municipality, barring any other realistic technological alternative, could always "pull the plug" although the Court never commented on any possible threat to public safety and park property such conduct may create?

PARTIES

The parties in this case are as follows:

1. Rock Against Racism, respondent.

2. Benjamin R. Ward, in his official capacity as Police Commissioner of the City of New York, petitioner.

3. George Scarpelli, in his official capacity as Chief of Operations for the Department of Parks, petitioner.

4. Sheldon Horowitz, in his official capacity as Special Events Director for the Department of Parks, petitioner.

5. Robert Russo, in his official capacity as Assistant Commissioner for City-Wide Services for the Department of Parks, petitioner.

6. Joseph Killian, in his official capacity as Program Director for the Mall Bandshell of the Bethesda Terrace area of Central Park in New York City, Department of Parks, petitioner.

7. Mayor Edward Koch, in his official capacity as Mayor of the City of New York, petitioner.

8. The City of New York, petitioner.

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THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION'S USE GUIDELINES ARE CONSTITUTIONAL AS THEY MEET THIS COURT'S TEST OF REASONABLE TIME, PLACE AND MANNER RESTRICTIONS BY GOVERNMENT WITH ONLY INCIDENTAL IMPACT ON THE EXERCISE OF FIRST AMENDMENT RIGHTS. THE PARKS DEPARTMENT'S DETERMINATION, AS REFLECTED IN THE USE GUIDELINES, TO REQUIRE SPONSORS OF EVENTS AT NAUMBURG BANDSHELL, A PUBLIC FORUM, TO USE A CITY DESIGNATED PROFESSIONAL SOUND ENGINEER, WHO WAS REQUIRED TO PROVIDE THE AESTHETIC MIX DICTATED BY SPONSORS AND A SOUND SYSTEM TAILORED TO THE INDIVIDUAL REQUIREMENTS OF SAID SPONSORS, AFFORDED USERS OF THE BANDSHELL UNFETTERED EXPRESSION TEMPERED ONLY BY THE NECESSARY REGULATION OF LOUDNESS TO PROTECT THE RIGHTS OF OTHER USERS OF THE PARK AND NEARBY RESIDENTS.

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BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit, dated June 2, 1988, is reported at 848 F.2d 367 and appears in the Appendix to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit at page 1.

The decisions of the United States District Court for the Eastern District, dated April 6, 1987, and April 30, 1987, appear in the Appendix to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit at page 23 and page 85. The first decision was reported at 658 F.Supp 1346 (S.D.N.Y. 1987). The second decision was not reported officially.

JURISDICTION

The judgment of the Court of Appeals was entered on June 2, 1988. The Petition for a Writ of Certiorari was filed on or about August 3, 1988 and was granted on October 3, 1988. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATEMENT OF FACTS[1]

The History of the Litigation

On or about April 19, 1985, Rock Against Racism (hereafter "RAR") commenced this action seeking an order requiring issuance of a permit for RAR to use the Central Park Naumberg Bandshell for a concert/political rally on May 5, 1985 (JA14).[2] On April 25, 1985, at the suggestion of the District Court, the parties reached a settlement in which the Department of Parks and Recreation agreed to issue RAR an event permit for use of the Bandshell if RAR would agree to abide by all Parks Department Regulations (JA382-383, 387-390). After further proceedings, on July 17, 1985, the case was placed on the reserve calendar (JA7, 384-385).

On April 23, 1986, RAR filed a motion for a preliminary injunction against the City from interfering with its annual concert scheduled at the Bandshell for May 4, 1986, and challenging as unconstitutional the Use Guidelines for the Naumberg Bandshell in Central Park issued by the Parks Department on March 21, 1986 (JA21). On May 1, 1986, the District Court, on the basis of

[1] The Statement of Facts, including the summary of testimony at trial, is limited to those issues raised on this appeal.

[2] Numbers in parentheses preceded by the letters "JA" refer to the pages of the Joint Appendix. Numbers in parentheses preceded by the letter "A" refer to the pages of the Appendix of the Petition for a Writ of Certiorari.

what it later described as "a relatively sketchy record" (A37),[3] upheld the Use Guidelines' requirements for a licensing fee, clean-up bond, and liability insurance, but struck down as unconstitutional the Guidelines' requirement that the Parks Department be the sole provider of sound amplification for Bandshell events and that the hours of the RAR's concert be limited to the Guidelines' reasonable time requirements (JA78-83).[4]

On November 5, 1986, RAR filed an Amended Complaint seeking both a declaratory judgment that the Use Guidelines were unconstitutional, and compensatory and punitive damages (JA84-90).

From March 23 through April 1, 1987, the Court conducted a trial regarding RAR's claims.

The Creation of Use Guidelines for the Naumburg Bandshell in Central Park

a. Why Use Guidelines Were Formulated for the Bandshell.

The Central Park Naumburg Acoustic Bandshell (hereafter "Bandshell"), designed to amplify sound, is located at 72nd Street and Fifth Avenue in New York City; and faces west (JA24, 202). It is a hexagonal amphitheater in a semicircle with seats for people to sit and listen (JA202, 407). Seating can be provided for up to three thousand people. The Bandshell area is the most frequently

[3] In its May 1 opinion, the District Court stated that "the timing [of the motion] does not permit extended analysis or discussion" as "[n]o arrangements were made to bring the dispute before the Court before April 23" (JA79). Moreover, the District Court indicated that "[n]o evidentary record exists except the opposing affidavits" (JA79).

[4] The City appealed the preliminary injunction enjoining the enforcement of the Use Guidelines provisions regarding sound amplification and hours of an event. The Court of Appeals for the Second Circuit dismissed the appeal as moot on August 20, 1986 because RAR had conducted its concert/political rally on May 4, 1986 and therefore, "the order appealed from no longer presents a live case or controversy." The Appendix to the appeal was offered jointly by petitioners and respondent as an exhibit during the trial of the instant case and was received in evidence (JA351-456).

used park facility in New York City (JA202), with the greatest proportion of events attracting large crowds (JA24, 202). The Bandshell season begins in the spring and runs until early fall. Approximately 1,000 event permits are issued each year for Manhattan parks, with about 330 in Central Park (JA24, 202). Of the 330 permits issued for events in Central Park, approximately 160 to 175 permits involve the use of the Bandshell (JA202).

Joseph Killian assumed the position of Program Director for the Mall/Bandshell/ Bethesda Terrace of the City of New York Department of Parks and Recreation ("Program Director") on January 27, 1986 (JA188). Killian was the first Program Director for the Mall/Bandshell/Bethesda Terrace area, the position having just recently been created (JA24). At the time of his hiring, he was told by Parks officials that the new position had been created to consolidate the fragmented responsibility for the Bandshell, and in recognition of the Bandshell's unique function as the busiest New York City park facility (JA24-25, 200-201). Previously, many Bandshell applicants had complained that they faced a bureaucratic maze of several City agencies and a host of sub-unit departments and divisions with control over one aspect or another of the Bandshell's application process (JA24-25). Vehicle permits, special event permits, and sound permits each had to be procured from a different office (JA25, 201). The Parks Department's Maintenance and Operations Division, the Special Events Director, Urban Park Services, the Central Park Administrator, and the New York City Police Department all had to be contacted (JA25, 201).

An adjunct to the fragmented structure was the lack of a single source of rules governing the Bandshell's use (JA25). Without possession of any set of rules, much less one set of rules specifically applicable to the Bandshell, applicants had even greater difficulty expeditiously negotiating the bureaucratic obstacles inherent in such dispersed authority (JA25). Creation of the position of Program Director was intended to address these applicant

complaints and to maximize the public's use of the Bandshell. Groups seeking use of the Bandshell now need to only contact the Program Director's office (JA201). The previously diffuse responsibilities were consigned solely to the Program Director for coordination and implementation (JA201).

When Joseph Killian commenced employment with the City, his initial and primary responsibility was to develop a uniform set of guidelines to be applied consistently to all applicants for the Bandshell (hereafter referred to as "the Use Guidelines") (JA204-205). Importantly, the Use Guidelines were to apply to all sponsors regardless of the type of event or expression presented (JA25, 211). The guidelines were never intended to limit or restrict the type of event (JA211). The purposes of the Use Guidelines were both to inform prospective applicants of the varied potential of the Bandshell, and to specify what was expected of them as users of the Bandshell. Joseph Killian explained these purposes at the trial (JA206):

> In all honesty, we're trying to serve groups. I mean, one of the difficulties is most of the people who use the bandshell are not producers, they are independent, they are ad hoc, whatever, and they come to use the facility and they don't know about sound or they don't know that we have no bathrooms there. So what we're trying to do is service them by saying here are the kind of things you're going to need to know about, here are the things that the department requires, and you can go to this office and get it done.

A number of steps were taken in the formulation of the Use Guidelines. Since Killian had been intimately involved in theatre, dance, music concerts and special events programming and production, including the development of a similar program in Grand Rapids, Michigan, he knew what general framework would be needed (JA25-26). To develop specific guidelines appropriate for the Bandshell facility, however, it was important for Killian to

familiarize himself with the particular characteristics, requirements, strengths, and disadvantages of the Bandshell, as well as its organizational place in the Parks Department (JA25-26).

First, Killian acquainted himself with the departments having primary responsibility over the Bandshell: the Central Park Administrator, the Parks Department Manhattan Borough Commissioner, and the Office of the Commissioner. He then arranged preliminary interviews with key individuals in each of these offices (JA26, 206-209).

After these preliminary interviews, Killian reviewed the follow-up reports by the Maintenance and Operations' crew of every 1985 event at the Bandshell. This involved review of approximately 100 applications. He also examined about ten to fifteen more detailed reports on events held at the Bandshell and surrounding areas (JA26, 207).

Killian learned that Central Park receives more than 13,000,000 visitors annually (JA24). He found that recent studies reviewed by the Parks Department showed that the large majority of visitors come to Central Park to relax (JA29, 40-46, 194, 207). On the weekends, passive recreation accounted for over 80 percent of park use, with simple "relaxation" alone reaching nearly 60 percent (JA29, 40-42, 44, 194). Music accounted for 5.7 percent of weekend park use (JA41; *see*, copy of 1983 City University of New York Study of Central Park [JA39-60]).

Two or three hundred yards southwest of the Bandshell is the Central Park area known as the "Sheep Meadow" (JA29). It is a thirteen-acre plot of land set aside for passive recreation (JA29, 192). The Sheep Meadow was designated a quiet zone, along with several other areas throughout the City, by mayoral decree of Edward I. Koch on July 25, 1985 (JA29, 192-193). No organized sports are allowed in the Sheep Meadow. People sun themselves there, read books, sit down and relax (JA29). According to Robert Russo, a Deputy Commissioner of Operations, visitors in

the Sheep Meadow are affected by loud performances in the Bandshell (JA397-398).

Based on his knowledge of special events production, his observation of the specific physical capabilities of the Bandshell area of Central Park, the various descriptive reports of 1985 events and park studies, and based upon his initial discussions with various Parks Department officials, Killian wrote the first draft of the Use Guidelines (JA25-27, 206-209). This first draft was reviewed by his direct supervisor, Marie Ruby, the Assistant Administrator for Visitor Services (JA27). The finalized version of the Use Guidelines was signed by the Commissioner of Parks on March 21, 1986 (JA207, 372-379).

b. Why the City Decided to Require Use of Its Own Sound Amplification System for Events at the Bandshell.

In formulating the Use Guidelines, the decision was made to require use of the City's sound amplification system for events at the Bandshell.[5] Killian's decision was rooted in two problems his investigation had disclosed (JA30). Sound amplification at the

[5] The Use Guidelines provide as follows on sound amplification:

> **SOUND AMPLIFICATION**
>
> To provide the best sound for all events Department of Parks and Recreation has leased a sound amplification system designed for the specific demands of the Central Park Bandshell. To insure appropriate sound quality balanced with respect for nearby residential neighbors and the mayorally decreed quiet zone of Sheep Meadow, all sponsors may use only the Department of Parks and Recreation sound system. DEPARTMENT OF PARKS AND RECREATION IS TO BE THE SOLE AND ONLY PROVIDER OF SOUND AMPLIFICATION, INCLUDING THOUGH NOT LIMITED TO AMPLIFIERS, SPEAKERS, MONITORS, MICROPHONES, AND PROCESSOR.
>
> Clarity of sound results from a combination of amplification equipment and a sound technician's familiarity and proficiency with that system. Department of Parks and Recreation will employ a professional sound technician [who] will be fully versed in sound bounce patterns, daily air currents, and sound skipping within the Park. The sound technician must also consider the Bandshell's proximity to Sheep Meadow, activities at Bethesda Terrace, and the New York City Department of Environmental Protection recommendations (JA375-376).

Bandshell conflicted with the enjoyment of the park by other park users, as well as disturbed residents in nearby, park-adjacent, buildings. The Bandshell "is in the heart of the park" (JA214). It "is where the majority of the people are. They are somewhere between 56th and 72nd between Fifth Avenue and Central Park West. That's where the bulk of our users are" (JA214). Since passive recreation accounted for over 80 percent of the park's use (JA29, 194), Killian was concerned with the fact that past complaints indicated "that sound levels were continuing to bleed out beyond the concert ground area for many events" (JA213). Noise levels from users of the Bandshell had evoked complaints from both park users and nearby residents (JA212). Killian found that the complaints centered on "I am over here on the other side of the park and . . . I can't sit here, relax" (JA214). Moreover, Killian had to consider the close proximity of the Sheep Meadow, a designated "quiet zone" (JA193) because "(p)eople enjoy sunbathing and relaxing" (JA214). Thus, for Killian, noise "was a real factor" that he based much of his noise regulations around (JA217). He explained, however, that by containing the sound in the Bandshell area, neither he nor the Parks Department sought to control the content or quality of Bandshell events (JA25, 211).

The second reason Killian decided that sound amplification at the Bandshell should be provided by the Parks Department was that he learned "that groups were often unfamiliar with producing events outdoors and they would come in with inadequate equipment and both their event and also the audience that was there to see it would suffer" (JA30, 189).

> Often times groups that use outdoor—if they are not familiar with outdoor—even if they are, they will use loudness and simply a loud decibel level to make up for—they may not be able to mix the sound very well and yet they feel that they can turn it louder, and excessively loud, that that makes up for it, and they try and, in a certain sense, override the mixing (JA218).

In addition, inadequate equipment used by some groups did not provide the amplification levels required, and "crowds unhappy with the poor sound became disappointed or unruly" (JA30).

Therefore, Killian was "looking for a way that we could provide quality sound and yet sound that did not bleed over into other areas of the park . . ." (JA219). To achieve this purpose, Killian decided to hire a private sound company for all Bandshell events.

Killian had considered alternative solutions to the sound problem. He considered negotiating with each individual group and agreeing on a decibel level (JA219-220). He considered allowing the public user to bring in its own sound system while the Parks Department would provide the sound technician (JA220). Killian considered as his third option "getting an independent vendor to provide sound, someone with extensive experience in all phases of music and dance and theatre to provide sound" (JA220). The first option was rejected because it was impossible to pick out a single decibel level because it could not be enforced and differences in temperature, foliage and audience size made picking one decibel level "very, very difficult" (JA220, 285-286). Killian was advised by the City's Department of Environmental Protection that variations in actual sound impact of particular decibel levels were too great to justify selection of a single decibel level (JA31). The second option was rejected because most technicians prefer to work with their own equipment (JA220), and lack of familiarity with the equipment would interfere with their ability to do a good job. In this way, Killian concluded that his third option was the most viable (JA220).

After the decision was reached to hire a private company, Killian contacted Gary Floyd as a consultant to draw up a "menu" of basic needs the Parks Department would want from a private sound company (JA221). Killian told Floyd he "wanted somebody with outdoor experience, good quality reputation, and also a

good inventory . . . I wanted to make sure they could do an entire season without breakdown" (JA223).

New York Sound (hereafter "NYS") was chosen by Killian as the private vendor to provide sound amplification at Bandshell events. NYS was selected because "[t]hey had the most extensive state-of-the-art equipment and they had the most backup and they had extensive outdoor experience" and the lowest bid (JA224). NYS provided sound amplification at every event in 1986 except for the Rock Against Racism event (JA224-225). Killian stated that even after NYS was chosen, private sponsors who had put in applications for the 1986 season were sent a "tech requirement form" to fill out by which they could advise NYS as to what type of sound equipment, such as microphones, speakers and amplifiers, they would need at their event (JA61-63, 225).

Killian acknowledged that after NYS was chosen, all the private sponsors were concerned (JA226). However, no sponsor canceled, and of the 50 to 60 amplified events which Killian attended in the 1986 season that NYS worked (JA226-228), including speeches, poetry, dance, theatre, jazz, opera and children's groups, no one expressed dissatisfaction or complained that the quality of the sound provided was inadequate (JA226-227). At the amplified events, "[t]he private sponsors would designate one person to be at the mixing board* and to say to the [NYS] technician what their preference on sound quality was" (JA229). Killian believed that "[NYS] tried to reflect the sponsor's interest as best as possible" (JA229). NYS provided a "consistency factor" because of its familiarity with the outdoor concert ground and the shell itself (JA244).

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* As explained by RAR's sound technician, ALAN THOMPSON, the mixing board is a console that combines all the sound signals from individual microphones placed before vocalists or instrumental performers, and "mix(es) them into one signal and feed it into the sound system" (JA100). The mixing board balances all of the sound signals "together to sound right to [the performer or group's] taste" (JA100). The mixing board also contains the master volume controls (JA120-121).

Robert Russo, the Deputy Commissioner of Operations for the Department of Parks and Recreation, stated that Joseph Killian was hired to manage the Bandshell because of the multitude of events as well as bring in additional events (JA331-333). In discussing the question of Bandshell regulations, Russo advised Killian "that we had lots of groups who came in and had varying abilities to produce an amplified sound. Some didn't amplify at all, some had . . . would come with their own systems, and I thought we should do something to make this more efficient, to manage it for all the groups, for each and every group that came in . . ." (JA333). Russo also noted: "Some [groups] were unable, for example to even get somebody to amplify sound for them and they would come to us and ask us to do it and we were unable" (JA333). Russo had advised Killian that the Parks Department "had gone to court about the volume of the sound amplification at this event, Rock Against Racism and that the Parks Department people, [Russo] included, felt that it was excessive, and that we had gotten some complaints over the years, several years about the excessive sound. . ." (JA335).

Russo recommended to Killian that the Bandshell regulations should give the City the power to control sound level at the Bandshell site (JA336-337). After discussing a number of options and rejecting the idea of a predetermined decibel level, the Parks Department agreed that a reputable sound amplification outfit should be hired, as amplification was outside the Parks Department expertise (JA337).

Directing his attention to the 1985 RAR event, Russo stated that "as far as the event [was] concerned, I had no problem with the event. It has occurred for years and I would not disapprove that. I didn't then and I don't now" (JA341). Russo's problem with RAR was "loudness of sound" (JA342).

Russo acknowledged that he had characterized RAR in a court proceeding as "dishonorable" (JA341). Russo based his opinion on the fact that the negotiations with RAR were always

very difficult and, even when they agreed to terms, RAR would violate the agreements (JA342-343). Russo summarized his experiences with RAR as follows (JA343):

> I think almost every year that I had experience with the [RAR] concert, the performance, the event extended over the time that we agreed that it should be ended. More vehicles were always brought into the park in the events that I remember than we had agreed to. We asked the license plate numbers of the vehicles so we could give them permits, so the people who were at the gates when the park is closed can let the vehicles in. They were never submitted. Vehicles were unregistered that came into the park. Vehicles were given summonses that were never paid. Environmental Control Board summonses were given out. They were never paid, they defaulted.
>
> That's why I say they are dishonorable. . .

Russo also noted that there was always a problem with the volume of sound at RAR events. RAR personnel would be asked to turn down the volume (JA345). "[S]ometimes they would comply and sometimes they would not" (JA345). Russo noted that the sound was so loud, it could be heard in the residential neighborhood of Central Park West (JA345). Usually, the police would ask RAR to turn down the volume, but often an argument would ensue (JA346-347). Russo remembered one RAR concert during which the police asked that the volume be turned down, and someone got up and told the crowd that the "pigs" (referring to the police) wanted the sound turned down (JA346-347). According to Russo, this "could rile the crowd up and the crowd would yell, and it's not nice to be there when this happens" (JA347). Noting that RAR could not be relied upon to voluntarily comply to turn down sound, Russo stated that "they want the sound I think as loud as it can possibly go" (JA347). Summonses for excessive noise had been issued on occasion, but RAR never paid

any of the fines (JA343). After stating that he had no opinion regarding the content of RAR's speech, Russo said:

> . . . The issue for me is loudness. I have to be able to—there has to be a point where I think one group's rights to amplify sound to the ears of all the other users in the park—somebody has to say "I think this is loud enough". . . (JA347).

William Dalton, the Chief of the Urban Parks Service for the New York City Parks Department, oversees the operations of the Parks Enforcement Patrol, who are peace officers deputized by the Police Department to enforce park rules and regulations (JA124-125). He is also in charge of the communications division for the Parks Department (JA125). From 1983 through 1986, Dalton was on-site for the RAR events as he was in charge of security and safety (JA126).

Dalton indicated that in 1986 there were complaints about the sound level at the RAR event (JA127). Most of the complaints came from the west side of the park, Central Park West and the side streets (JA127). The complaints centered on "loud noise," "too loud" and "too much amplification of Bandshell concert" (JA141). Dalton thought that the number of complaints received for the Sunday RAR event were disproportionate to any other Sunday event (JA138).

Dalton was aware of disputes between members of the Police Department and RAR sponsors regarding sound levels at their event (JA127). A representative of the police would ask Dean Tuckerman[7] of RAR to turn down the volume (JA127). Mr. Tuckerman objected to the request (JA129). Sometimes "the sound was turned down" and "at times, it wasn't" (JA129). Said Dalton: "It was an ongoing request by the Police Department because the sound levels would change constantly during the day" (JA129).

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[7] DEAN TUCKERMAN testified on behalf of RAR, describing his work with the oranization as involving applying for permits, organizing speakers and groups and providing some of the publicity.

Dalton noted that after those times that the sound was turned down, it would rise again (JA130-131). And then the police would ask that the sound be turned down. Dalton described it as "a constant scenario" (JA131).

Dalton recalled in 1983 and 1984 that the police "pull[ed] the plug" on the sound system at the RAR event (JA140). Both times that the plug was pulled, the RAR event had continued beyond the time allowed on the Parks' permit (JA140-141).

c. How the Sound Company Was Chosen to Amplify Sound Events at the Bandshell.

Gary Floyd was hired by Joseph Killian to assist him in evaluating proposals by independent sound companies who submitted proposals for sound amplification for events at the Bandshell (JA145-146). At the time he was hired, Floyd was a self-employed consultant for sound, lighting and staging for performance and theatrical events (JA141). He had been working in the area for 17 years (JA141). His prior experience included his having been in charge of site planning and technical coordination for the Smithsonian Institution's American Folk Life Festival held on the mall in Washington, D.C. (JA142). Floyd had also staged several outdoor events for North Carolina's Department of Cultural Resources (JA143-144). Much of Floyd's work involved the evaluation of sound systems for events that he was involved in.

Killian and Floyd generated a list of minimum requirements for the solicitation of bids from sound companies (JA148). Thereafter, they reviewed proposals from 16 sound companies (JA148). Because the proposals were not submitted in a uniform manner, some coming in the form of a letter, others as a list of inventory, Floyd summarized the proposals on a "tubular form" whereby he and Killian were able to compare equipment inventory and prices of each company (JA149-150).

Floyd's final recommendation to Killian was based on three factors. First: Floyd considered the inventory each company

could provide for a Bandshell event (JA152). Floyd was concerned whether the bidding sound companies had the ability to provide a complete inventory for any event (JA153). Floyd was careful to obtain this information not only from the submitted proposals but in follow-up phone conversations with the bidders (JA154). Second: Floyd spoke with contractors who had used the services of the bidders. (JA152). Third: Floyd spoke directly with each of the companies, as he was looking for more than a sound company (JA152).

> . . . [W]e look for somebody who isn't just there to put up a microphone that's turned on and collects the check at the end of the day. We look for a company that's very involved, that provides a professional demeanor, a professional style in the performance situation, a company that provides a lot of expertise and assistance to the performers to make them as professional as possible. In a number of instances of the types of programs that Central Park has produced this was of great benefit I think to some of the performers (JA152).

On this basis, Floyd recommended that NYS be hired to provide sound amplification at Bandshell events (JA153).

NYS was hired by Killian on a trial basis for nine performances before he decided to hire them for the entire 1986 season (JA155). In this way, Killian had a chance to determine whether NYS was satisfactory both in their competence technically and in their ability to work with the performers (JA155). Floyd reviewed the work of NYS on 12 different occasions (JA156). He wanted to determine if they were fulfilling their obligations (JA156). At the first event, Floyd provided an evaluation of the quality of the sound and made some suggestions for changing the placement of speakers (JA157). He also took some sound measurements around the perimeter of the Bandshell area (JA157).

As a result of taking the sound measurements, Floyd had some backs of the speakers raised so "that their coverage was

more directed towards the audience area directly" (JA169). Floyd believed this change "would provide a better sense of coverage and more enclosed area of sound rather than trying to send sound out beyond the particular audience area" (JA169). Floyd found that NYS provided more than enough equipment for Bandshell events particularly as it was only running at approximately one-third of its given capacity (JA158).

Without identifying himself, on several occasions, Floyd spoke to on-site performers as to whether they would hire NYS (JA159). Floyd found that the reaction was generally positive (JA159). There was no indication from any of the performers in the 1986 season that NYS's services were less than adequate (JA160-161). In fact, Floyd learned from Killian that NYS was contracted by some of these same performers for services needed at concerts held outside of the Bandshell (JA160).

Floyd found that NYS had provided appropriate services for the different types of performers including folk, rhythm and blues, rock and roll, and reggae, which included such instruments as electrified piano, guitars, bass amps, and full drum sets (JA160). Floyd thought that the amplification for the louder events was more than adequate (JA161). As to the question of esthetic balancing, the sound company showed remarkable sensitivity to that problem (JA161). Floyd received no complaints from any audience member that the mix was inadequate (JA161).

A technical questionnaire had been sent by Killian several months in advance to groups that were going to perform (JA61-63, 166). The questionnaire elicited from the performer what his sound amplification needs would be, including speakers and microphones, type of instrument or voice that was to be used. In this way, a particular performer's technical needs could be addressed (JA61-63, 165). NYS also regularly called performers from time to time before the event (JA167). Killian explained, in

this manner performers' needs were served and NYS avoided wasting manpower (JA167-168).

Finally, with regard to the professional competence of NYS's technician, Floyd offered the opinion that

> . . . I think in general they were always agreeable, very helpful, considerate of the performers. In fact I think they supplemented the stage management staff that was there. It was like having two extra, you know, staff members for the overall staff provided by the park services (JA185).

Floyd added: "I think they were very competent. I would not hesitate to use them again" (JA185).

Floyd was also asked whether "the single most important factor in the reproduction of amplified sound . . . is really the person who is working on what is called the soundboard . . ." (JA178). Floyd did not think that was necessarily so (JA178). Floyd explained that while he "place(d) high reliance on the technician at the console knowing what the equipment should do" (JA180), the aesthetic choices still remained with the musician. The technician obtains the necessary information concerning the performer's preference at the beginning of the performance. The performers are very specific about what they like and dislike (JA180). In this way, concluded Floyd, an experienced technician can within a span of "generally five minutes" learn how to provide the desired mix of any band (JA181).

d. How the Sound Level Is Determined at a Bandshell Event.

The District Court took note of paragraph 6 of the City proposed conclusions of law which stated:

> The guidelines seek to regulate sound levels without reference to speech content through a requirement that all sponsors use the sound amplification equipment and

> professional staff retained by the department for all Bandshell events (JA222).

The Court asked Killian "in what manner do the requirements of equipment and staff operate to regulate sound levels" (JA222). Killian explained that "the private sponsor would basically designate one person to be at the mixing board and to say to [the City's hired] technician at the board what their preference on sound quality was" (JA229). In other words, the City's hired sound technicians would set up the equipment and "are actually at the board mixing and listening to it . . . but in terms of regulation, in terms of mix, most sponsors chose to elect someone from their own group to say 'Hey, we need a little bit more on bass or we need a little softer here, a little stronger here' " (JA222).

Killian also stated that the sound level is not set at one volume. "If more people arrive, more bodies are absorbing the sound, you have to bring the level up a bit. It's a great sensitivity and it's a relationship between a delegate from the sponsor and also the technician. In the end, though, that person is [the City's] contractor" (JA223). However, Killian did note that there was no interference between the NYS and a private sponsor by a City employee (JA229-230). NYS's direction from the City was to obtain the best quality production and best mix possible with a concern for containing the sound in the concert ground (JA230).

The Court asked Killian what happens if there is a disagreement about volume (JA222). Killian indicated that "(i)t is [NYS's] hand that is there" (JA223). Though ultimately the determination is made by NYS's technician, Killian explained that when the sound level is too high "you simply go to the sponsor or you bring the sponsor out to that point [of the periphery of the concert ground (JA234)] and then we go to the Board and change it" (JA232). Killian explained further that he would discuss the excessive sound, and the fact that it was bleeding into adjacent areas with the sponsor. Killian could not recall an instance where

a sponsor objected to sound being turned down if it was excessive outside of the concert area (JA236). Said Killian:

> . . . Certainly within the concert ground and within audience parameters there is always discussion, and in all those situations it's deferred to the sponsor to make the judgment in those cases (JA236).

The Volume RAR Recognizes as Too Loud for the Bandshell Is One that Would Cause "People's Ears to Bleed."

Alan Thompson is the sound engineer for RAR (JA100), having worked approximately 200 concerts for the organization since 1980 (JA103). His regular employment is sound reenforcement consultant (JA112). He also "designs systems for people who want to put a sound system in a restaurant or a club or an outdoor farm . . ." (JA112).

On the day of a concert, Thompson's role is primarily to set up and engineer the sound system (JA100). Thompson explained that "(e)ngineering the sound means setting up all the individual microphones on all the individual instruments . . . then it's all plugged into a console that combines multiple signals into one signal which is then fed into a sound system" (JA100). Through the console, Thompson is balancing all the instruments together to suit the performer's taste (JA100). Thompson explained that on the console "between 200 and 300 adjustments can be made, and during the course of a song [his] hands will be moving all over the Board" (JA101). There are eight master volume sliders that control the volume (JA121).

Thompson stated that RAR cannot afford to pay bands that play at their event (JA114). "So what [RAR does] is we rent one [sound] setup which they all share, and to do that we have to provide what they need and what they request" (JA114). In other words, RAR "arrange[s] a common stage set up that is agreeable to all of [the bands]" (JA115). Thompson noted that, if RAR did not provide the sound equipment, bands would have to bring

their own equipment and they would have to charge RAR a very large fee (JA114).

Thompson explained that the sound system contains a device called a "limiter" or a "compressor" which is designed to limit peaks, "so that if an unexpected peak should come through, in other words, if someone would drop a microphone against a floor or scream in the mike all of sudden, this compression would automatically limit the sound. . ." (JA117). The following exchange then took place at trial:

> Q. Given the fact that you do limit the sound that is emitted from the performance of RAR at the Bandshell, do you recognize that there might be a sound level that's unreasonable for [the Bandshell] area?
>
> A. I think a volume that would cause people's ears to bleed would be too loud.
>
> • • •
>
> Q. So you're saying that nothing less than that level would be unreasonably loud?
>
> A. Not really. I would say that a painfully loud—if it was painfully loud that would be unreasonably loud (JA118).

Thompson acknowledged that he was unfamiliar with the quality of equipment provided by NYS, the company hired by the Parks Department to provide sound at Bandshell events (JA123). He also admitted that he had not attended any event at the Bandshell in 1986 during which NYS provided the sound amplification (JA123). During his testimony, RAR neither questioned Thompson nor did Thompson himself suggest a reasonable alternative to controlling loudness at Bandshell events other than having a City-designated sound engineer at the console or mixing board.

The District Court's Opinions

(1)

Originally on May 1, 1986, the District Court preliminarily enjoined the City from enforcing the Use Guidelines "on the basis of a relatively sketchy record" (A37). The Court, in issuing the injunction, indicated that it was under the impression that "the City intended to impose upon RAR a sound system of unknown quality, seemingly under the sole control of an individual owing his allegiance to a City contractor and not to RAR as sponsor of the event" (A37).

After an extensive trial on the amended complaint seeking declaratory judgment that the Use Guidelines were unconstitutional as well as compensatory and punitive damages, the District Court concluded that the Guidelines relating to sound limitations were supported by the evidence. In its Opinion, dated April 6, 1987, the District Court stated that it had learned at trial that the City was concerned that sound generated by Bandshell events was extending unnecessarily beyond the listening area into adjoining sections of the park as well as annoying residents of buildings which adjoin the park (A43). The Court found that the objective of the City in hiring a sound company was to place control of the volume in its hands and ensure the quality of sound at Bandshell events (A40). This approach arose out of the City's concern that amplified sound generated at Bandshell events be sufficient to reach all listeners in the defined concert areas but that the sound not extend unnecessarily beyond the listening area (A43).

After reviewing the evidence concerning the use of New York Sound, the District Court found "that the sponsors of 1986 events at the Bandshell were uniformly pleased with the quality of the amplified sound" (A41).

The Court approved the process by which the Parks Department regulated the sound at the concerts. It explained that amplified sound at a concert consists of two basic components: sound

quality or "mix," and sound volume (A41). A series of stage microphones are placed throughout the performers (A41-42). The sounds picked up by these microphones are fed into a "mixing board" at which New York Sound's engineer presides. His adjustments at the board control the mix of sound which is then amplified through a series of speakers (A42). " The City's practice for events at the Bandshell is to give the sponsor autonomy with respect to the sound mix: balancing treble with bass, highlighting a particular instrument or voice, and the like" (A42). The District Court noted that "[t]he New York Sound engineer does all that he can to accommodate the sponsor's desires in those regards" (A42).

The District Court recognized that sponsors of the Bandshell events are entitled under the First Amendment to content neutral regulations that guarantee them a level of sound amplification reasonably necessary to carry their message to the outer boundaries of the audience area (A45). But it noted that "a user has no right, First Amendment or otherwise, to turn up the volume as loud as it wishes" (A45). The City has a legitimate governmental interest in controlling excessive sound (A44), and its interest in preserving the quality of urban life "is one that must be accorded high respect" (A44).

The Court accepted that RAR had a First Amendment right to use of a sound amplification system capable of producing the quality of sound it desires (A46). But the Court did not "detect a First Amendment right to own the sound amplification system used" (A46). It found that "the City's implementation of the Bandshell guidelines provides for a sound amplification capable of meeting RAR's technical needs and leaves control of the sound mix in the hands of RAR" (A46-47). The District Court observed that "RAR's interest in using its own equipment and sound engineer is, in the circumstances revealed the evidence, 'attenuated' at best" (A47).

In upholding the guidelines, the District Court noted that these regulations satisfied the principles set forth by this Court. The regulations are sufficiently narrowly tailored to further the legitimate state interest. The District Court noted that prior efforts of Parks Department's representatives to reduce RAR's sound levels had been unavailing and confrontational (A47). It concluded that "[d]irecting a New York Sound technician to turn down the sound in case of need is less intrusive than pulling the plug . . ." (A47-48).

(2)

After issuance of the District Court's opinion, RAR moved to amend the judgment to clarify whether the District Court's Opinion of April 6, 1987 allowed RAR to "actually control the mixing board and sound system." By its Memorandum Opinion, dated April 30, 1987, the District Court interpreted RAR's motion to "suggest" that the City-designated technician "is not able properly to implement a sponsor's instructions as to sound quality or mix" (A89). Significantly, the Court found:

> No evidence to that effect was offered at trial; as noted, the evidence is to the contrary (A89).

Accordingly, the District Court expressed its intention that control of the mixing board would be in the hands of the City-designated technician (A88). However, the technician, the District Court ordered, "is required to defer to the sponsor's desires as to sound quality, but not to the sponsor's demands for increased volume, subject only to those constitutional entitlements described in the prior opinion" (A88-89). In other words, the District Court not only found that the Guidelines did not infringe on RAR's First Amendment rights, but it "ordered" the City to follow the Guidelines in order to insure that RAR's rights remained intact.

The Court of Appeals' Opinion

The Court of Appeals purported to apply the same principles as the District Court in reviewing the disputed guidelines. It

recognized that content neutral time, place and manner regulations are permissible so long as they are narrowly tailored to serve a substantial government interest and do not unreasonably limit alternative avenues of expression (A11). The Court noted "[h]owever, the method and extent of such regulation must be reasonable, that is, it must be the least intrusive upon freedom of expression as is reasonably necessary to achieve a legitimate purpose of regulation (citations omitted)" (A12).

Finding that "the city's express purpose is to prevent the noise generated at the bandshell from intruding upon those who do not choose to attend or hear the musical presentation" (A12-13), the Court of Appeals held the City's regulation valid only to the extent necessary to control volume (A18). The Court stated that "[r]estriction to use of the city's choice of sound systems is not shown to be necessary to control noise levels. Any system has a volume control." (A17).

In holding that the Parks Department could alleviate the problem solely by a volume control which could override all sound systems, the Court of Appeals ignored the evidence of the inexperience of some Bandshell users in producing an event in the outdoors and the inadequacy of equipment of some users with resulting inadequate amplification levels and disappointed and unruly crowds (JA30). In applying its least restrictive alternative standard, the Court recognized the inadequacy of its own suggestion that a volume limiting device in the possession or control of the City-employee would always be a solution (A18-19). In the event the City could not devise a method to control volume that meets the least intrusive standard, the Court concluded: ". . . the plug can be pulled on the sound to enforce the volume limit" (A21 n.6). In reaching this conclusion, the Court did not acknowledge the substantial risk to public safety and park property that such a volume control method might create.

Finally, the Court of Appeals concluded that the City's regulations somehow standardized a musician's expression (A21). No

facts were cited by the Court to substantiate its conclusion, nor was reference made to the District Court's fact-finding that the evidence at trial demonstrated that the sponsor's instructions regarding sound quality or mix would be achieved under the City's Use Guidelines (A89).

The Court of Appeals upheld the District Court's judgment in so far as it sustained the right of the City to limit volume of performances at the Bandshell (A22). It reversed that portion of the District Court judgment which had upheld the Use Guidelines requirement of the use of a designated sound engineer and sound system (A22).

SUMMARY OF ARGUMENT

(1)

The fundamental issue is what constitutional test is to be applied in determining whether content-neutral regulations of expression applied to a public forum are "narrowly tailored" to their government purpose. This Court has stated that whether regulations are sufficiently tailored "must be evaluated in terms of their general effect." *United States* v. *Albertini*, 472 U.S. 675, 689 (1985). Such regulations are not invalid simply because there is some imaginable alternative that might be less burdensome to freedom of speech. *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984). Similarly, the validity of such regulations does not turn on a judge's agreement with the responsible decision maker concerning the most appropriate method for promoting significant governmental interests. *Id*. Instead, it is the duty of the judiciary to determine whether the local authority, entrusted with the management and protection of the local public forum and its environs, has enacted regulations that, though incidental in their impact on speech, are neutral in purpose and promote a substantial government interest that would be achieved less effectively absent the regulation. *United States* v. *Albertini*, *supra*, 472 U.S. at 689.

(2)

Joseph Killian, Program Director for the Naumberg Bandshell located in Central Park, was confronted with a long history of excessive noise from Bandshell events interfering with the use of the park by persons who came simply to relax and disturbing nearby residents. With the assistance of a professional sound consultant, Killian devised Use Guidelines that required users of the Bandshell to use a professional sound engineer and state-of-the-art sound equipment provided by a sound company hired by the City.

The practice of the Parks Department was to allow the sponsor of an event at the Bandshell to designate a representative to direct the sound company's engineer as to how their sound was to be "mixed," but ultimate control of the volume remained with the City. In this manner, the City was able to delimit the bleed of sound beyond the perimeter of the Bandshell area while performers were provided with the mix they wanted.

The United States Court of Appeals for the Second Circuit held that the Use Guidelines promulgated by the Parks Department requiring permittees of the Naumberg Bandshell in Central Park to use the City-hired sound company's sound system and sound technician were unconstitutional in that the designated method of regulating the volume of sound was not the "least intrusive" upon the freedom of expression. In so finding, the Second Circuit apparently attached little significance to 1) the testimony of Joseph Killian which disclosed that he had considered alternative methods for reducing volume as impractical before adopting the solution contained in the Use Guidelines; 2) the observations of Killian of the production of 50 to 60 amplified events including speeches, poetry, dance, theatre, jazz, opera and children's groups using the City-hired sound company and the fact that no one expressed dissatisfaction or complained that the quality of the sound provided was inadequate or claimed that their right of expression was infringed; 3) the finding of the trial court that, as a

matter of fact, the sound engineer hired by City could and would provide the mix desired by the users of the Bandshell; and 4) the admission by Rock Against Racism that it had never used the City-hired sound company or witnessed an event produced by the company and therefore was not familiar with how the sound company produced a Bandshell event.

(3)

The Court of Appeals did not disagree with the District Court holding that the City had the right to regulate excessive noise in the Bandshell with content-neutral time, place and manner regulations. But in a literal application of the "least intrusive" principle, it held that while the City could retain control of the volume emitted from the loudspeaker system in some undefined fashion, it could not participate in the mixing of sound.

In dictating how the City should control loudness at the Bandshell, the Second Circuit improperly substituted the judgment of the court for that of the locality in determining what is an appropriate time, place and manner regulation. The inappropriateness of the least intrusive standard test is highlighted by the Circuit Court's suggestion that if there is no method whereby the City could control only volume, the City could "[a]s a last resort," pull the plug to enforce the sound limit. It does not have to be emphasized that "pulling the plug" during a concert before a large excited audience is not a practical alternative.

The Court of Appeals failed to address itself to any of the local problems—including technological feasibility and the risk to public safety and park property were the plug to be pulled on an event—that confronted the Parks Department when it devised its regulatory scheme. Moreover, the Circuit Court, while alleging that the City's regulation "standardized" expression, simply ignored the fact-finding by the District Court that the evidence adduced at trial had demonstrated that artistic expression at the Bandshell remained intact with the Guidelines because the City-

designated sound technician at the Bandshell had to follow the "sponsor's instructions as to sound quality or mix."

(4)

The decision of the Court of Appeals for the Second Circuit ignores the holdings of this Court that due deference must be accorded regulatory bodies which fashion regulations that are attuned to the problems of the locale and which are in a better position to make remedial determinations than a court, particularly where the challenged regulations are content-neutral. *See, Clark* v. *Community for Creative Non-Violence, supra,* 468 U.S. at 299. The least intrusive standard used by the Second Circuit has never been a part of the inquiry of a time, place, manner restriction. *Regan* v. *Time, Inc.*, 468 U.S. 641, 657 (1984). Instead, as this Court has mandated in such cases as *Clark* v. *Community for Creative Non-Violence, supra,* and *United States* v. *Albertini, supra,* a content-neutral regulation need only be so narrowly tailored as to substantially serve the legitimate ends of government. The judiciary has not been assigned the authority to replace the Department of Parks and Recreation as manager of Central Park. *Clark* v. *Community for Creative Non-Violence, supra,* 468 U.S. at 299. Instead, where the Parks Department has enacted regulations that serve the interests of its citizens in limiting the assault of loud noise from Bandshell events while still allowing users of the Bandshell, as found by the trial court, to musically express themselves without their aesthetic tastes being compromised, then the City's Use Guidelines must be found narrowly tailored so as to pass constitutional muster and any judicial interference therewith cannot be justified.

(5)

Even assuming that the Court of Appeals' least intrusive principle is the applicable standard to be applied, the Guidelines satisfy that standard. The control of the volume and mix by a sound engineer independent of the Bandshell user is the only feasible method of assuring that a public event such as a concert will

not intrude on other users of the park nor disturb nearby residents.

ARGUMENT

THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION'S USE GUIDELINES ARE CONSTITUTIONAL AS THEY MEET THIS COURT'S TEST OF REASONABLE TIME, PLACE AND MANNER RESTRICTIONS BY GOVERNMENT WITH ONLY INCIDENTAL IMPACT ON THE EXERCISE OF FIRST AMENDMENT RIGHTS. THE PARKS DEPARTMENT'S DETERMINATION AFTER LENGTHY STUDY, AS REFLECTED IN THE USE GUIDELINES, TO REQUIRE SPONSORS OF EVENTS AT NAUMBERG BANDSHELL, A PUBLIC FORUM, TO USE A CITY DESIGNATED PROFESSIONAL SOUND ENGINEER, WHO WAS REQUIRED TO PROVIDE THE ESTHETIC MIX DICTATED BY SPONSORS AND A SOUND SYSTEM TAILORED TO THE INDIVIDUAL REQUIREMENTS OF SAID SPONSORS, AFFORDED USERS OF THE BANDSHELL UNFETTERED EXPRESSION TEMPERED ONLY BY THE NECESSARY REGULATION OF LOUDNESS TO PROTECT THE RIGHTS OF OTHER USERS OF THE PARK AND NEARBY RESIDENTS.

(1)

This Court has developed a well- established body of case law setting forth the standards of review of governmental regulations which impact on the exercise of free speech. Regulations enacted for the purpose of restraining speech on the basis of its content "presumptively" violate the First Amendment. *City of Renton* v. *Playtime Theatres,* 475 U.S. 41, 46-47 (1986). However content-neutral time, place and manner regulations are permitted if they are narrowly tailored to serve a substantial governmental interest and leave ample alternative avenues of communication. *Clark* v. *Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984); *Perry Education Ass'n* v. *Perry Local Educators Ass'n,* 460 U.S. 37, 45 (1983); *Heffron* v. *International Society for Krishna Consciousness,* 452 U.S. 640, 648 (1981).

Content-neutral restrictions are those restrictions that are "justified without reference to the content of the regulated speech." *Boos* v. *Barry*, __ U.S. __, 108 S. C t. 1157, 1163 (1988), citing, *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). In the case at bar, the Use Guidelines were applied without any reference to the content of any Bandshell user's speech (JA25, 36, 211). They were justified by the City's concern with maintaining a measure of tranquility in the urban environment by turning down the volume of Bandshell events in Central Park.

"The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community." *Kovacs* v. *Cooper*, 336 U.S. 77, 83 (1949). Numerous cases recognize the City's interest in regulating sound levels. *See e.g., Frisby* v. *Schultz*, _U.S._, 108 S. Ct. 2495, 2502 (1988) (Government may protect individuals from the intrusion of unwanted speech into their homes.); *Grayned* v. *City of Rockford*, 408 U.S. 104, 119 (1972) (antinoise ordinance was a reasonable regulation; appellant's conduct interfered with the rights of others); *Kovacs* v. *Cooper, supra*, 336 U.S. 77 (1949) (ordinance upheld prohibiting use of sound amplifiers emitting "loud and raucous noises").

As this Court stated in *Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 806 (1984):

> In upholding an ordinance that prohibited loud and raucous sound trucks the Court [in *Kovacs* v. *Cooper*] held that the state had a substantial interest in protecting its citizens from unwelcome noise... [M]unicipalities have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression.

The City's interest is no less significant where a park is involved. If anything, the preservation of Central Park in an urban environment for quiet relaxation, passive recreation, and appreciation of

nature suggests that the governmental interest is even more significant. *See, Clark* v. *Community for Creative Non-Violence, supra*, 468 U.S. at 296 (citing "the Government's substantial interest in maintaining the parks in the heart of our Capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence").

This Court has repeatedly held that the First Amendment does not bar the application of neutral regulations that incidentally burden speech. *Consolidated Edison Co.* v. *Public Service Commission.*, 447 U.S. 530, 535-536 (1980). Regulations that do burden speech incidentally or control the time, place, and manner of expression must be evaluated in terms of their general effect. *United States* v. *Albertini*, 472 U.S. 675, 689 (1984). Such regulations are not invalid simply because there is some imaginable alternative that might be less burdensome on speech. *Clark* v. *Community for Creative Non-Violence, supra*, 468 U.S. at 299. Instead, an incidental burden that is no greater than is essential is permissible so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively. *United States* v. *Albertini, supra*, 472 U.S. at 689. "The validity of such regulations does not turn on a judge's agreement with the responsible decision maker when concerning the most appropriate method for promoting significant government interests." *Id.* Accordingly, such regulations are not invalid simply because there is some imaginable alternative that might be less burdensome to freedom of speech. *Clark* v. *Community for Creative Non-Violence, supra*, 468 U.S. at 299. In other words, less or least restrictive analysis is not and has never been part of the inquiry into the validity of a time, place, manner restriction. *Regan v. Time, Inc.*, 468 U.S. 641, 657 (1984). *See, City of Wateska* v. *Illinois Public Admin. Council*, _ U.S. _, 107 S. Ct. 919, 920 (1987) (Chief Justice Burger and Justices White and O'Connor dissenting.)

Rule making by local authorities entrusted with the management and protection of their local public forums and their environs is to be accorded due deference based on their expertise.

White House Vigil v. *Clark*, 746 F. 2d 1518, 1531 (D.C. Cir. 1984). The judiciary has not been assigned the authority to replace local authorities and to engage in judicial rule making. *Clark* v. *Community for Creative Non-Violence*, *supra*, 468 U.S. at 299. Because a city's interest in attempting to preserve the quality of its urban life must be accorded high respect, local regulators must be afforded an opportunity to formulate solutions to serious problems. *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976). Courts simply are "not in a position to evaluate the feasibility of administration and enforcement of regulations, as are the agencies, who are therefore properly charged with drafting them." *White House Vigil* v. *Clark*, *supra*, 746 F. 2d at 1529 n.83.

(2)

The Parks Department employees properly applied the principles of this Court in establishing content-neutral regulations that are narrowly tailored to the City's substantial interest in maintaining the tranquility desired by the vast majority of users of Central Park and by nearby residents. In the center of the most heavily used portion of Central Park lies the Naumberg Bandshell (JA214). For years, sound amplification of events at the Bandshell had not only disturbed residents of nearby neighborhoods, but it conflicted with the enjoyment of the park by other park users (A43). Faced with the fact that 80 percent of the users of the park came simply to relax (JA29), the Department of Parks and Recreation sought to resolve the conflict between audiences at Bandshell events and nearby relaxing park users. To do this, they hired Joseph Killian as the first Program Director of the Bandshell.

As Program Director of the Bandshell, Killian undertook a study of those City departments that had responsibility over the Bandshell (JA26). He interviewed key individuals in those departments (JA26). He then reviewed reports of maintenance and operation crews at Bandshell events (JA26). He also reviewed detailed reports of events held at the Bandshell as well as park studies (JA26). Based on his investigation, he discovered a bureaucratic maze that hindered permit applicants for the Bandshell (JA24).

Importantly, in terms of this appeal, Killian found that excessive sound amplification at Bandshell events, which was annoying other park users and nearby residents, was rooted in two contexts. One, as exemplified by concerts sponsored by RAR, was that sponsors would not reduce sound levels as requested by authorities on the scene (JA129-131, 345-347). Second, excessive sound was also caused by groups using the Bandshell who were unfamiliar with sound amplification in an outdoor setting and who sometimes came with inadequate equipment for their events (JA189-190, 218).

The Use Guidelines were drafted in direct response to this study. The Use Guidelines eliminated the bureaucratic maze so that permit applicants had only to apply at the Bandshell's Program Director's office for the required vehicle, special event and sound permits (JA373-374). The Use Guidelines also regulated the manner and use of sound amplification, the hours and dates for events, the number of spectators, toilets, public safety, vehicles in the park and clean-up in order that events could be safe, orderly and considerate of the rights of other park users and nearby residents (JA374-378).

The Use Guidelines were content neutral. They applied to all applicants seeking use of the Bandshell without regard to the content of speech to be employed at their particular event (JA25, 211). The time, place and manner restrictions applied to applicants without regard to the type of event (JA211).

To the extent the Guidelines regulated sound, they were justified without reference to the content of speech. *Boos* v. *Barry*, __ U.S. __, 108 S. Ct. 1157, 1163 (1998), *citing*, *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986). The basis of the justification was the fact that by regulating volume, the Guidelines were concerned only with the secondary effects of amplified sound on

the surrounding community and park areas. Similarly, by providing a professional sound engineer to regulate the mix, the City sought to control excessive amplification by groups with either inadequate equipment or experience to properly produce a Bandshell event. Such regulation of the secondary effect of communication, rather than the content of speech, has been found not to impermissibly infringe upon the free exercise of First Amendment rights. *City of Renton* v. *Playtime Theatres, Inc., supra,* 475 U.S. at 47. This is particularly true where the City has demonstrated that the restriction of amplified sound is justified by the significant interest of affording all park users the benefits of the park while allowing nearby residents the quiet enjoyment of their dwellings. *See, Kovacs* v. *Cooper, supra,* 336 U.S. at 89. (1949).

(3)

The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." *Grayned* v. *City of Rockford, supra,* 408 U.S. at 116. The well-developed record below, which included five days of trial testimony, demonstrated that the City met this standard of reasonableness. Joseph Killian found that Central Park was used by City dwellers for any number of different reasons, including relaxation, nature, music and sports (JA40-41). Trying to accommodate these diverse purposes, Killian circumscribed a Bandshell user's freedom of speech only to the extent that the volume of their message was limited to the audience that attended their event. Thus, rather than abridge or regulate anyone's expression, the City merely limited the volume of an event so that others could use the park in ways they deemed as important as RAR's desire to convey its message. Such a result is compatible with the normal activities of the park at the time of RAR's concert. The City had a right to turn down RAR's overamplified assault on its citizenry. *Kovacs* v. *Cooper, supra,* 336 U.S. at 88.

The Use Guidelines also left RAR and all Bandshell users with ample alternative channels for communicating their message. Neither RAR nor any sponsor was denied access to the Bandshell by the Use Guidelines. The Use Guidelines only placed reasonable limitations on the sound level so that audiences at Bandshell events could hear while minimizing sound intrusions on other park users. Moreover, the Parks Department assured the performers that by providing sound controlled by an independent professional sound company, the limitations would not affect their artistic expression. Indeed, the sound company hired by the Parks Department, New York Sound, provided Bandshell users with state-of-the-art sound equipment tailored to their specifications (JA61-63, 224-225) and professional sound system technicians to produce their concerts (JA224). Therefore, while the sound system provided and controlled by the Parks Department may not have been RAR's preferred mode of expression, it is undeniable that it did not prevent anyone from delivering to the public their intended message. *Clark* v. *Community for Creative Non-Violence, supra,* 468 U.S. at 295 (1984) (the prohibition against sleeping overnight in the park was not a barrier to delivering to the public by other means the intended message concerning the plight of the homeless); *Olivieri* v. *Ward,* 766 F.2d 690, 694 (2d Cir. 1985), *cert. den.* _ U.S. _, 107 S. Ct. 1371 (1987) (plaintiff's "group is not being stopped from conveying its message. They are merely not being allowed their preferred forum for demonstration.") Moreover, numerous other park bandshells and many other suitable concert spaces were available throughout the City, should RAR have believed or found that the Central Park Bandshell was no longer appropriate (JA36).

(4)

As demonstrated during trial, the Parks Department's decision to provide a sound system tailored to the sponsor's specifications for each Bandshell event was based on two specific governmental interests. First, sound amplification at the Bandshell had, on a regular basis, conflicted with the enjoyment of the park by other park users and disturbed residents in nearby,

park-adjacent buildings (JA28, 212-213). The Parks Department had consistently received complaints from residents who live along the park about the noise of weekend musical events (JA212-213). Second, groups sponsoring events a the Bandshell were often unfamiliar with sound reproduction outdoors and often either did not know how to amplify sound outdoors properly or used inadequate equipment (JA189-190, 218). Moreover, Joseph Killian ascertained that differences in temperature, foliage and audience size made picking out a single decibel level difficult, if not virtually impossible on a one-time basis (JA220, 285-286, 285-286).

The Parks Department determined that many of the complaints concerning excessive sound levels at the Bandshell were avoidable with proper amplification techniques (JA29). Thus, to address the concerns of excessive sound levels and poor amplification, and to accommodate the interests of other park users, nearby residents, and those attending the performance, in accordance with the Use Guidelines, the Parks Department hired a professional sound company, New York Sound, because it had the "ability to provide a complete [sound] inventory for any event" (JA153) and was able to devise and provide a proper sound amplification tailored to both the needs of the sponsor and the environment of the Bandshell (JA30, 61-63, 153, 166-167).

The Use Guidelines required the sound engineer to control the "mixing board," that is, he would make those adjustments at the board that would control the mix or relative volume of each instrument and/or vocalist which was in turn amplified through a sound system. But as found by the District Court (A42), the sound engineer was required to defer to the wishes of the sponsor with regard to the "sound mix" as long as the sound did not bleed excessively into other park areas (A7, JA222, 236-237). The District Court also found that in this manner, the City's sound engineer was able to provide the sponsor with the mix he desired

(A89). Similarly, control of the volume would remain with the sound engineer. These regulations properly balanced the need to preserve the performer's right to convey his message with the equally compelling need to minimize the amount of sound that bled unnecessarily beyond the listening area into adjoining sections of Central Park where other park users might be pursuing other forms of recreation.

(5)

In rejecting the Department of Park's accommodation of free expression for both Bandshell users and nearby park users and residents, the Second Circuit disregarded this Court's view of reasonable time, place and manner restrictions. Finding that the City had the right to regulate noise levels (A13), the Circuit Court ruled that "the method and extent of such regulation . . . must be the least intrusive upon freedom of expression as is reasonably necessary to achieve a legitimate purpose of regulation" (A12).[9] With this overly narrow focus, the Circuit Court concluded that absent a technological method for controlling volume and only volume at Bandshell events, the City could "as a last resort" pull the plug on an event. The Circuit Court expressed no thought regarding the practicality of "pulling the plug" during a concert before a large excited audience. Moreover, the Circuit Court gave no credit to the finding by the District Court that, as a matter of fact, RAR had produced no evidence that any sponsor's artistic expression had been compromised by use of the City's sound system and sound engineer (A89). *Compare, Reeves* v. *McConn*, 631 F.2d 377, 387 (5th Cir. 1980).

Nor did the Circuit Court take into account the fact that RAR's criticism of the regulation as it applied to artistic expression was based on pure speculation. RAR was totally unfamiliar

[9] The Second Circuit has recently also applied the "least restrictive standard" to the regulation of commercial speech. *Fox* v. *Bd. of Trustees of the State University of N.Y.*, 841 F.2d 1207, 1214 (2d Cir. 1988), *cert. granted*, _U.S._, 57 U.S.L.W. 3200 (October 3, 1988) (No. 87-2013).

with the production of an event by the City-hired sound company. No RAR witness had ever attended an event at the Bandshell during which New York Sound, the City-hired sound company, provided sound amplification (JA123). In contrast, there was evidence adduced at trial that Killian had observed 50-60 events at the Bandshell in which New York Sound had participated and not one sponsor or musician had objected to the sound quality (JA226-227). Their criticism, therefore, is hardly a basis to overrule the District Court's determination that the City-designated sound engineer would control the mix to reflect the expression of the performers (A46-47).

(6)

The Second Circuit applied the least restrictive standard despite this Court's clear and repeated refusal to adopt this test. "The less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of a time, place, and manner restriction. It is enough that the restriction substantially serves the Government's legitimate ends." *Regan* v. *Time, Inc.*, 468 U.S. 641, 657 (1984). See, *City of Wateska* v. *Illinois Public Admin. Council*, ___ U.S.___, 107 S. Ct. 919, 920 (1987) (Chief Justice Burger and Justices White and O'Connor dissenting). *In Clark* v. *Community for Creative Non-Violence*, *supra*, 468 U.S. at 299, this Court, in addressing directly the contention that a National Park Service regulation prohibiting sleeping in a park as part of a demonstration to call attention to the plight of homeless, was unconstitutional because a lower court could hypothesize a less speech restrictive alternative, stated:

> We are unmoved by the Court of Appeals' view that the challenged regulation is unnecessary, and hence invalid, because there are less speech restrictive alternatives that could have satisfied the Government interest in preserving park lands.

In *United States* v. *Albertini*, *supra*, 472 U.S. at 675, this Court confronted the claim that the general exclusion of recipients of

so-called "bar letters" from military open houses failed under the First Amendment "because it is greater than is essential to the furtherance of Government interests in security of military installations." Rejecting the narrowness of this standard, this Court, in holding that "focusing on whether there were conceivable alternatives to enforcing the bar letter" provides an answer to the wrong question, stated (472 U.S. at pp. 688-689):

> The First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important government interests. See *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 296-297 (1984) ("the validity of this regulation need not be judged solely by reference to the demonstration at hand"). Regulations that burden speech incidentally or control the time, place, and manner of expression, see *id.*, at 298-299, and n. 8, must be evaluated in terms of their general effect. Nor are such regulations invalid simply because there is some imaginable alternative that might be burdensome on speech. (emphasis added.) *Id.*, at 299.

The requirement that regulations be narrowly tailored does not require so focused a view of their impact on First Amendment expression that no regard is taken of the ramifications of such a least restrictive view. For example, in *Heffron* v. *International Society for Krishna Consciousness*, *supra*, 452 U.S. at 640, this Court weighed the impact of a rule of the Minnesota Agricultural Society (which operates an annual state fair) that limited all persons or groups desiring to sell, exhibit or distribute materials during the fair, to do so only from fixed locations. This Court found that the State's interest in confining distributions, selling and fund solicitation activities to fixed locations in order to satisfy the State's interest in crowd control satisfied the requirement that a place or

manner restriction serve a substantial state interest. *Id.*, at pp. 653-654.

Directing its attention to the Minnesota Supreme Court's holding that the State could avoid the threat to the interest posed by "less restrictive means, such as penalizing disorder or disruption, limiting the number of solicitors, or putting more narrowly drawn restrictions on the location and movement of [Krisha] representatives," this Court held that "it is quite improbable that the alternative means suggested by the Minnesota Supreme Court would deal adequately with the problems posed by the much larger number of distributors and solicitors that would be present on the fairgrounds if the judgment below were affirmed." *Id.*, at p. 654. In other words, this Court recognized that the constitutional propriety of content-neutral regulations should not be determined in a vacuum. Rather, the court reviewing the regulation must consider the context and the problems of the local agency confronted when it fashioned its rules. "[T]he City must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Young* v. *American Mini Theatres, Inc., supra,* 427 U.S. at 71.

(7)

The wisdom of the Parks Department in determining to provide a tailored sound system to meet the sponsors' individual needs and a professional sound engineer experienced in outdoor events is entitled to substantial deference. *See, Clark* v. *Community for Creative Non-Violence, supra,* 468 U.S. at 299 (judiciary does not have the "authority to replace the Park Service as the manager of the Nation's parks or . . . the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained"); *Young* v. *American Mini Theatres, supra,* 427 U.S. at 71 (it is not the function of the court to appraise the wisdom of an administrative body's conclusion that its "restriction will have the desired effect"). As previously demonstrated, the Use Guidelines are reasonable and were narrowly

drawn to respond to the significant governmental interests involved.

By requiring sponsors to use a state-of-the-art sound system tailored to their individual needs and a designated professional sound technician, the incidental restriction on sound amplification, if any, is no greater than is essential to the furtherance of those interests, which would be achieved less effectively absent the regulation. *United States* v. *Albertini, supra,* 472 U.S. at 689; *Clark* v. *Community for Creative Non-Violence, supra,* 468 U.S. at 296-298; *United States* v. *O'Brien,* 391 U.S. 367, 377 (1968). In providing a tailored sound system manned by professional sound technicians for the specific outdoor demands of the Bandshell, the Parks Department has narrowly tailored the Use Guidelines to address the excessive sound levels and poor sound amplification problems of prior years (JA29, 30, 127, 193-195, 334-335). The Use Guidelines are "not invalid simply because there is some imaginable alternative that might be less burdensome on speech." *United States* v. *Albertini, supra* 472 U.S. at 689.[9]

(8)

The Second Circuit's view is mired in its pointed avoidance of the multifaceted nature of the sound problem facing the City. To begin with, the volume controls and mixing controls were on one board. Challenged by sponsors such as RAR who were immune to instructions from authorities to reduce volume, the Parks Department had no choice but to place the board in the hands of

[9] In analogous Fourth Amendment analysis, this Court has noted that "[t]he reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." *Illinois* v. *Lafayette,* 462 U.S. 640, 647 (1983). "A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished." *United States* v. *Sharpe,* 470 U.S. 675, 686-687 (1985). Therefore, "[t]he logic of such elaborate less-restrictive- alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers." *United States* v. *Martinez-Fuerte,* 428 U.S. 543, 556-557 n. 12 (1976).

one engineer to avoid further disputes that might arise over control of the board. Placing one engineer in charge of the board conformed to the reality that mix and volume are interrelated and to the fact that adjustments to both must be made throughout an event (JA100-102, 120-122). The City was confronted with sponsors, such as RAR, whose concern for the enjoyment of other park users is summed up in the standard of loudness announced by the organization's sound engineer:

> I think a volume that would cause people's ears to bleed would be too loud (JA118).

In addition, the City had groups using the Bandshell who were unable to "mix" sound very well, and would resort to loudness to compensate for their lack of mixing skill (JA219). With these two problems in mind, the City devised the Use Guidelines, which unlike so many other content-neutral regulations, not only did not infringe on expression, but actually assisted the communication of those groups who without the requisite mixing skills of out-of-doors production or state-of-the-art sound equipment (JA152,185,224) could not provide top quality sound at the Bandshell. As noted above, in 1986 New York Sound was responsible for 50-60 amplified events. No group expressed dissatisfaction or complained that the quality of the sound was inadequate (JA226-227). It is ironic that RAR, through this case, is the only group to object to this system in view of the fact that they have never used the City's hired sound technician and sound system nor have they ever witnessed its use. *See, Members of The City Council of Los Angeles* v. *Taxpayers for Vincent, supra*, 466 U.S. at 810 (the regulation "responds precisely to the substantive problem which legitimately concerns the City. The ordinance curtails no more speech than is necessary to accomplish its purpose.")

(9)

Although we do not believe that the least restrictive test set forth by the Court of Appeals is the standard pursuant to which the regulations in issue should be reviewed, it is submitted that

the regulations satisfy this stricter standard. There is no other feasible alternative to the employment of a City-hired professional sound technician and sound system. In devising the Guidelines, Joseph Killian considered alternative solutions to the sound problem. He considered negotiating with each individual group to establish a decibel level (JA219-220). This solution Killian rejected because differences in temperature, foliage and audience size made picking one decibel level very difficult (JA220, 285-286). He weighed allowing the public user to bring his own sound system while requiring use of a Parks Department sound technician. This alternative was rejected by Killian because technicians prefer to work with their own equipment (JA220) and lack of familiarity with the equipment would interfere with their ability to provide the sound quality sought by the sponsor. Only the third option, of "getting an independent vendor to provide sound, someone with extensive experience in all phases of music and dance and theatre to provide sound," (JA220) would be effective in dealing with Bandshell sound problems.

In this context, it is worth noting that in prior years, RAR had consistently violated agreed-upon sound levels in the face of repeated requests by the police to reduce the sound (JA129-131, 345-346). At least one request to turn down the sound resulted in RAR members provoking the crowd against the police (JA346-347). Summonses for excessive noise have also been issued to no avail (JA343). And, at least twice, the plug on RAR had to be pulled in order to stop their event from continuing beyond the time allotted on their permit (JA140-141). Moreover, RAR has never offered a reasonable alternative solution to the City's noise problems at the Bandshell. Instead, ignoring its history of belligerence, RAR's only suggestion to the Circuit Court was "that the City could simply ask concert producers to turn their sound down" or "prosecute offenders under the noise regulation law." App.'s Circuit Br., p. 17. In this light, the propriety of the Parks Department's solution is compelling.

In the absence of any record or reasonable suggestion by RAR, the Court of Appeals on its own suggested that the City exercise control only over the volume. However, the volume and mix are on the same instrument panel and are regulated simultaneously. The City's decision to have one professional sound technician operate the entire board is a reasonable one. The Court of Appeals acknowledged that its suggestion might not be feasible by noting that "[a]s a last resort. . . the plug can be pulled on the sound to enforce the volume limit" (A21n.6). It does not have to be emphasized that the removal of a plug during a concert attended by a large crowd is not a practical solution.

In contrast to the Second Circuit's speculative suggestions, the City's solution has been implemented, evaluated and has been deemed satisfactory, without any participating sponsor voicing a complaint. Under the circumstances, the Parks Department's solution to its volume problem is the least intrusive alternative.

In *Clark*, *Albertini* and *Regan*, this Court set forth a balancing test that places appropriate reliance on the wisdom of the local regulatory body faced with their own particular problems. The balancing test allows local regulatory bodies to formulate solutions within legal parameters that are practical rather than theoretical. Accordingly, it is for the courts to determine "whether an agency's decision is within the zone of constitutionality, not in choosing between options within that zone." *White House Vigil* v. *Clark*, *supra*, 746 F.2d at 1531. To endorse the Second Circuit's test is to sanction judicial rule making and "assign to the judiciary the authority to replace the Park Service as manager of [City's] parks" (*Clark* v. *Community for Creative Non-Violence*, *supra*, 468 U.S. at 299), a position never endorsed by this Court.

CONCLUSION

The Judgment Of The Court Of Appeals For The Second Circuit Should Be Reversed, With Costs. The Judgment Of The District Court Which Declared The Use Guidelines Constitutional Insofar As They Required Permittees To Use Only The Department Of Parks And Recreation's Sound Engineer And Sound System Should Be Reinstated.

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